Supreme Court, U.S.
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No. 04-1375

IN THE

Supreme Court of the United States

SAMUEL GLAZER,

Petitioner,

v.

LEHMAN BROTHERS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JPMORGAN CHASE & CO.

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RULE 29.6 STATEMENT

J.P. Morgan Securities Inc., a subsidiary of JPMorgan Chase & Co., is successor to Respondent Hambrecht & Quist Incorporated. Respondent JPMorgan Chase & Co. has no corporate parent, and no publicly held company owns more than 10% of its stock.

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INTRODUCTION

Respondent JPMorgan Chase & Co. ("JPMorgan") opposes Samuel Glazer's Petition for Writ of Certiorari to the extent that Glazer seeks reversal of *Fazio v. Lehman Bros., Inc.*, Sixth Circuit Case No. 02-3822 ("*Fazio* Decision"), which was one of several appeals reported in a consolidated opinion at 340 F.3d 386 (6th Cir. 2003) ("Consolidated Opinion"). This Court should deny Glazer's Petition with regard to the *Fazio* Decision for the following reasons:

(1) The Sixth Circuit merely consolidated the various appeals that were addressed in the Consolidated Opinion. It did not merge those appeals so that a party to one appeal became a party to all appeals. Consequently, Glazer was not a party to the *Fazio* Decision. Because Glazer was not a party to the *Fazio* Decision, he lacks standing to seek reversal of that decision.

(2) The *Fazio* Decision was entered on August 13, 2003, nearly two years ago. Any appeal of that decision is time-barred.

(3) The *Fazio* Decision arose out of *Fazio v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV157 ("*Fazio* District Court Case"). All claims against JPMorgan that were asserted in that case have been resolved through arbitration before the New York Stock Exchange and are now *res judicata*. Any appeal of the *Fazio* Decision is therefore moot.

In addition, JPMorgan agrees with and adopts the arguments made by Respondents Lehman Bros., Inc. and S.G. Cowen and Co. and joins them in opposing Glazer's Petition for Writ of Certiorari in its entirety. In the interests of brevity, JPMorgan will not repeat those arguments here.

STATEMENT OF THE CASE

The Sixth Circuit's Consolidated Opinion, filed on August 13, 2003, addressed appeals arising out of seven different district court cases.[1] In all seven cases, the District Court denied motions to compel arbitration. Petitioner Glazer was a party to only one of those district court cases – *Glazer v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02 CV 370 ("*Glazer* District Court Case") – and to two appeals – *Glazer v. Lehman Bros., Inc.*, Sixth Circuit Case Nos. 02-3823 and 02-3824 (*Glazer I*). Respondent JPMorgan was not a party to the *Glazer* District Court Case or to *Glazer I*. Instead, JPMorgan was a party to two other district court cases – *Fazio v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV157 ("*Fazio* District Court Case") and *Lopardo v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV764 ("*Lopardo* District Court Case") – and in the appeal that led to the *Fazio* Decision.

The appeals addressed in the Consolidated Opinion were consolidated "for purposes of briefing and submission" only. *See* Order dated August 21, 2002 (Appendix A). They were later consolidated for oral argument. *See* Order dated June 9, 2003 (Appendix B). Throughout, however, the various appeals retained separate captions and separate case numbers. *See* Consolidated Opinion at Caption.

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[1] *Fazio v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV157; *Glazer v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV370; *Visconsi v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV382; *Spitalieri v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV761; *Lopardo v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV764; *Savoca v. Lehman Bros., Inc.*, N.D. Ohio Case No. 1:02CV968; *Bonutti v. Lehman Bros. Inc.*, N.D. Ohio Case No. 1:02CV1018.

After the Sixth Circuit issued its Consolidated Opinion, the seven district court cases took separate paths. As Glazer notes in his Petition, the defendants in the *Glazer* District Court Case again moved the District Court for an order compelling arbitration, the District Court again denied the motions, and the defendants again appealed, leading to *Glazer v. Lehman Bros., Inc.*, 394 F.3d 444 (6th Cir. 2005) (*Glazer II*). The plaintiffs in the *Fazio* District Court Case, in contrast, voluntarily submitted their claims against JPMorgan to arbitration before the New York Stock Exchange. That arbitration is concluded, and the Fazios' claims against JPMorgan have been fully resolved.

REASONS FOR DENYING THE PETITION

A. Glazer lacks standing to appeal the *Fazio* Decision because he is not a party to that appeal.

It is axiomatic that one cannot appeal a decision to which one was not a party and in which one has no direct stake. *See Marino v. Ortiz*, 484 U.S. 301, 303, 108 S. Ct. 586, 587, 98 L. Ed. 2d 629, *rehearing denied*, 484 U.S. 1082, 108 S. Ct. 1064, 98 L. Ed. 2d 1026 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well-settled"); and *Karcher v. May*, 484 U.S. 72, 77, 108 S. Ct. 388, 392, 98 L. Ed. 2d 327 (1987) ("[W]e have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom"). In seeking review of the Consolidated Opinion as a whole, Glazer fails to recognize the distinction between *Glazer I*, in which he was a party, and the *Fazio* Decision, in which he was not. Because Glazer was a party to *Glazer I*, he had a direct stake in the outcome of that case and may

have had standing to appeal *Glazer I.* Because, however, Glazer was *not* a party to the *Fazio* Decision and was wholly unaffected by that decision, Glazer lacks standing to appeal the *Fazio* Decision.

In making this procedural error, Glazer appears to have mistakenly assumed that the Sixth Circuit merged the various appeals considered in the Consolidated Opinion into a single case. The Sixth Circuit, however, made clear in two separate orders that the cases were merely consolidated for limited purposes, not merged. *See* Order dated August 21, 2002 (Appendix A) and Order dated June 9, 2003 (Appendix B). The Sixth Circuit confirmed that the cases retained their separate identities by retaining separate captions and case numbers in its final opinion. *See* Consolidated Opinion at Caption.

Directly on point is *United States v. Tippett*, 975 F.2d 713 (10th Cir. 1992). In that case, four inmates had appealed a trial court's denial of their application for statutory witness fees. Like the various defendants here, the four inmates filed separate appeals, which appeals were then consolidated by the Tenth Circuit. After the Court of Appeals affirmed the denial of witness fees, one of the inmates petitioned this Court for a writ of certiorari. This Court accepted the case and reversed the Court of Appeals, holding that the inmate was entitled to a witness fee. *Id.* at 715. Relying on that ruling, one of the other inmates renewed his request for witness fees in the district court. The district court denied this second request, holding that because he had not appealed the decision against him to the Supreme Court, the Court of Appeals' earlier decision controlled the disposition of his renewed request. *Id.* at 716. The Tenth Circuit affirmed, holding that the various inmates' appeals, though consolidated, were not

merged. Therefore, since the second inmate was not a party to the first inmate's appeal, his application for witness fees was barred. *Id.* at 718-19.

An analogous case is *In re TMI Litigation*, 193 F.3d 613 (3d Cir. 1999), where the district court consolidated several cases and then granted summary judgment in all cases based on a "mini-trial" involving twelve "typical" plaintiffs. *Id.* at 628. The Third Circuit reversed the grant of summary judgment against all but the twelve plaintiffs who were actually parties in the mini-trials because the other plaintiffs could not be bound by the result of a case in which they were not parties. *Id.* at 727. The Court explained:

> Consolidation, however, is only a matter of "convenience and economy in administration." Consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."

Id. at 725 (quoting *Johnson v. Manhattan R. Co.*, 289 U.S. 479, 497, 53 S. Ct. 721, 77 L. Ed. 1331 (1933).

As the above authority makes clear, consolidation is not merger. Consolidation does not transform parties in one suit into parties in the other consolidated suits. Thus, the fact that the Sixth Circuit issued the Consolidated Opinion does not convert the several appeals addressed in that opinion into a single case or make Glazer a party to the *Fazio* Decision. Because Glazer is not a party to the *Fazio* Decision, he lacks standing to appeal that decision.

B. Any appeal of the *Fazio* Decision is time-barred.

Supreme Court Rule 13 provides that petitions for certiorari must be filed within ninety days after the Court of Appeals enters its decision. Sup. Ct. R. 13.1. At most, a petitioner may obtain one sixty-day extension. Sup. Ct. R. 13.5. The Consolidated Opinion was issued in August, 2003, more than two years ago, and is therefore clearly time-barred. Petitioner Glazer, however, argues that this Court should ignore the lateness of his petition because his petition is timely with regard to *Glazer II*, and the Consolidated Opinion and *Glazer II* are both part of the same case. Glazer's argument fails because it applies, if at all, only to *Glazer I*, not to the Consolidated Opinion as a whole, and certainly not to the *Fazio* Decision.

JPMorgan was not a party to *Glazer I* and expresses no view regarding whether Glazer's argument can save his appeal of that decision. With regard to the *Fazio* Decision, however, Glazer's argument does not apply. *Glazer II* and the *Fazio* Decision are not part of the same case, and the timeliness of Glazer's petition with regard to *Glazer II* could not save his appeal of the *Fazio* Decision, even if he had standing to raise such an appeal.

C. All issues raised in the *Fazio* District Court Case are *res judicata*.

Even if Glazer could overcome his lack of standing and the untimeliness of his appeal, certiorari should still be denied with regard to the *Fazio* Decision because any appeal of that decision by Glazer would be pointless. After the Court of Appeals issued the *Fazio* Decision, the plaintiffs in the *Fazio* District Court Case submitted their claims to arbitration

before the NYSE. That arbitration is now concluded, and the *Fazio* plaintiffs have not challenged the result.[2] Consequently, the issues raised in the *Fazio* District Court Case are *res judicata*. The outcome of an appeal by Glazer would not disturb the result reached in the *Fazio* arbitration.

The Tenth Circuit's *Tippett* decision is again instructive. In *Tippett*, the Court held that the reversal of its earlier decision in an appeal by one inmate had no effect on the finality of that same earlier decision as it applied to another inmate, even though the earlier decision was incorrect. As the Tenth Circuit explained:

> Although the Supreme Court's ruling in *Demarest* reversed this court's decision on the merits of whether § 1821 granted witness fees to prisoners, the finality of this court's decision denying Durre's request for witness fees was not affected by the Supreme Court's decision. . . . Our denial of Durre's witness fees, though wrongly decided under the later Supreme Court ruling, became final forty-five days after the entry of judgment. Tenth Cir. R. 40.3. Thus, the district court properly held Durre's second claim for fees was barred by the principles of claim preclusion.

Tippett, 975 F.2d at 719 (citing, at ellipsis, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428, 69 L. Ed. 2d 103 (1981) ("[T]he *res judicata*

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[2] An issue has arisen regarding whether certain parties other than JPMorgan have properly paid attorney fees awarded in the arbitration. That issue is unrelated to the merits of the arbitrators' decision and to the arbitrability of the case.

consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case."); *id.* at 399 n.4, 101 S. Ct. at 2428, n.4. ("[A]n adverse judgment from which no appeal has been taken is *res judicata* and bars any future action on the same claim, even if an authoritative contrary judicial decision on the legal issues involved is subsequently rendered in another case.").

Like the second inmate in *Tippett*, the plaintiffs in the *Fazio* District Court Case did not appeal the *Fazio* Decision. Consequently, no appeal by Glazer can upset the finality of the resolution of the *Fazio* plaintiffs' claims. Those claims are *res judicata.* Because the Fazio plaintiffs' claims are now *res judicata* and would be unaffected by an appeal of the *Fazio* Decision by Glazer, any appeal by Glazer of the *Fazio* Decision would be meaningless.

CONCLUSION

To the extent that Glazer seeks reversal of the *Fazio* Decision, this Court should deny Glazer's Petition for the following reasons: (1) Glazer was not a party to the *Fazio* Decision and lacks standing to seek reversal of that decision; (2) any appeal of the *Fazio* Decision is time-barred; and (3) all claims against JPMorgan asserted in the *Fazio* District Court Case are *res judicata*.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 21, 2002

Case Nos: 02-3820: 02-3821: 02-3822: 02-3823: 02-3824: 02-3825: 02-3826: 02-3867: 02-3868: 02-3869: 02-3870: 02-3871: 02-3872: 02-3873; 02-3874

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT FAZIO, et al.,

Plaintiffs - Appellees

v.

LEHMAN BROTHERS, INC.; LEHMAN BROTHERS HOLDINGS, INC.;

Defendants

S.G. COWEN SECURITIES CORPORATION; SOCIETE GENERALE;

Defendants - Appellants

HAMBRECHT & QUIST, INC.; J.P. MORGAN CHASE & COMPANY

Defendants

ORDER

The court having determined that consolidation of the above causes for purposes of briefing and submission is appropriate,

Appendix A

It is ORDERED that the causes be and they hereby are consolidated for the purposes stated above.

Counsel who have filed more than one appeal for appellants are directed to file one consolidated appellant brief on behalf of the parties they represent. Enclosed with this order is the briefing schedule.

ENTERED PURSUANT TO RULE 45(a), RULES OF THE SIXTH CIRCUIT.
Leonard Green, Clerk

s/ Leonard Green

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JUNE 9, 2003

Case Nos: 02-3820-26; 02-3867-74; 03-3041-45; 03-3112/3113/3258

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT FAZIO, et al.,

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Defendants - Appellants

HAMBRECHT & QUIST, INC.; J.P. MORGAN CHASE & COMPANY

Defendants

ORDER

Upon consideration of motions for additional time for oral argument, the court DIRECTS that these cases be consolidated for oral argument.

Appendix B

It is further ORDERED time will be one half hour to be divided between defendants and one half hour to be divided between plaintiffs. Time will be increased at the discretion of the court as it sees fit.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk